

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CIVIL REVISION APPLICATION No. 235 of 2004****For Approval and Signature:****HONOURABLE MR.JUSTICE RAVI R.TRIPATHI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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ISHWARBHAI PURSHOTTAMBHAI PATEL - Applicant(s)
Versus
CHANDRAKANTBHAI PURSHOTTAMBHAIPATEL & 1 - Opponent(s)

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Appearance :

MR PRAKASH K JANI for Applicant(s) : 1,
MR DHIRAJ M PATEL for Opponent(s) : 1,
RULE SERVED for Opponent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI**Date : 14/02/2006****ORAL JUDGMENT**

The petitioner-original opponent no.1 is before this Court being aggrieved of order dated 2nd July 2004 passed by the learned City Civil Judge, Court No.10, Ahmedabad below exh.1 in Darkhast No.258 of 2001.

2. The learned Judge was pleased to hold that the

petitioner (in Darkhast No.258 of 2001) is entitled to proceed against the respondents to execute the award in the sum of Rs.50,47,045=00. The learned Judge was pleased to reject the objections filed by the respondents in this regard.

3. Mr.P.K. Jani, the learned advocate appearing for the petitioner herein has furnished a compilation of documents running into 151 pages to enable the Court to peruse these documents as and when required, while appreciating the submissions made by the learned advocate.

4. The controversy involved in this Civil Revision Application is two-fold. One as to, 'whether the Arbitrators' Award dated 26th April 1998, the gist of which is set out in para 2.3 of the memo of revision application, can be enforced by respondent no.1 herein (original applicant in Darkhast) in view of clause (18) of para 2.3 which is reproduction of original clause (17) of the award wherein it is stated that,

“In the matter of interpretation or implementation of this award if the parties have any difference of opinion then in that regard our opinion

(arbitrator) is to be taken and whatever is our decision, it shall be binding on the parties. ..."

The matter pertains to a family dispute between the brothers, four in number, of which the petitioner herein-Ishwarbhai Purshottambhai Patel (original opponent in Darkhast) and respondent no.1 herein-Chandrakantbhai Purshottambhai Patel (applicant in Darkhast) are the main contesting parties. The father of the petitioner and respondent no.1 was one of the arbitrators, assisted by one Chartered Accountant.

5. The learned advocate appearing for the petitioner vehemently submitted that respondent no.1 (original applicant) could not have approached the Court by filing Darkhast No.258 of 2001 mainly on two grounds, namely,

(i)in view of clause (17) of the Arbitration Award, which is mentioned hereinabove provided that the parties shall refer the matter back to the arbitrators in case there is any difference of opinion either on interpretation or implementation of the award and that decision of the arbitrators shall be binding on the parties; and

(ii)that the Arbitration Award was not registered

under Registration Act, 1908 and therefore, it could not have been enforced.

Besides that the learned advocate for the petitioner also submitted that the learned Judge has erred in holding that the petitioner in Darkhast- respondent no.1 herein is entitled to execute the award which is in a sum of Rs.50,47,045=00. He submitted that in fact this figure is not even correctly worked out. The learned advocate further submitted that the learned Judge has committed error in rejecting the objections filed by the present petitioner. The learned advocate tried to invite attention of this Court to para 17 of the impugned order and requested this Court to look into the calculation aspect along with other aspects of the matter. The learned advocate reiterated that the Court should not have entertained the Darkhast in view of the objections filed before it wherein it was pointed out that the parties were required to approach arbitrators when there is difference of opinion between the parties.

6. The learned advocate to substantiate his submission relied upon a decision of the Honourable the Apex Court in the matter of Satish Kumar and others Vs. Surinder Kumar and others, reported in A.I.R. 1970 SC 833. The

learned advocate invited attention of the Court to the following observations of the Hon'ble the Apex Court,

"An award given under the Arbitration Act on a private reference requires registration under Section 17(1)(b) of the Registration Act, if the award effects partition of immovable property exceeding the value of Rs.100/-.. ..
.."

7. The learned advocate for the petitioner submitted that the Hon'ble the Apex Court has held that,

"The award does create rights in property **but those rights cannot be enforced until the award is made a decree of the Court.** It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps. For the purpose of Section 17(1)(b) of the Registration Act, all that is necessary is whether the award purports or operates to create or declare, assign, limit or extinguish whether in present or future any right, title or interest whether vested or contingent of the

value of one hundred rupees and upwards to or in immovable property. If it does, it is compulsorily registrable. Section 17 does not concern itself with the enforcement of rights. (emphasis supplied)

8. The learned advocate next relied upon a decision of the Hon'ble the Apex Court in the matter of **Ratan Lal Sharma Vs. Purshottam Harit**, reported in A.I.R. 1974 SC 1066. The learned advocate submitted that the Hon'ble the Apex Court has held in no uncertain terms that,

“Where the terms of the arbitration award did not transfer the share of a partner-A in the assets of a firm to the other partner-B either expressly or by necessary intendment but on the other hand expressly made an allotment of the partnership assets and liabilities to B making him absolutely entitled to the same in consideration of a sum of money to be paid by him to the other partner-A, thereby expressly purporting to create rights in immovable property of the firm worth above Rs.100/-, the award is compulsorily registrable under section 17 Registration Act and, if unregistered, cannot

be looked into and the court could not pronounce judgement in terms of award under section 17 Arbitration Act, 1940, which presupposes the existence of an award which can be validly looked into by the Court. The award being an inseparable tangle of several clauses cannot be enforced as to part not dealing with immovable property."

The learned advocate for the petitioner submitted that in the present case also the award has demarcated the rights of the parties and has thus, created rights in favour of the parties in various properties and therefore, applying the principle laid down by the Hon'ble the Apex Court, the award was compulsorily registrable. He submitted that in absence of the registration, the award could not have been taken note of by the learned Judge in Darkhast proceedings.

9. The learned advocate next relied upon a decision of the Hon'ble the Apex Court in the matter of Sardar Singh Vs. Smt. Krishna Devi and another, reported in A.I.R. 1995 SC 491.

The learned advocate submitted that the Hon'ble the Apex Court was pleased to declare that the "award made by

private arbitrator is non-testamentary instrument."

In this regard the learned advocate invited attention of the Court to para 5 of the judgement, which is as under:

"The award made by a private arbitrator is non-testamentary instrument under Section 17(1)(b), though the counsel for the appellant contended contra and we need not dilate on this aspect. In Satish Kumar, (1969) 2 SCR 244 : (AIR 1970 SC 833) an arbitrator was appointed by the parties without reference to the court to partition their immovable properties. An award in that behalf was made and on an application under S.14 of the Arbitration Act, the award was made a rule of the Court. The question arose whether such award was admissible in evidence as affecting partition of the immovable property. This Court held that the award required registration under Sec.17(1)(b). Therefore, the award is a non-testamentary instrument."

The learned advocate for the petitioner submitted that the Hon'ble the Apex Court has held that, 'the award by a private arbitrator even if made rule of the court, it

cannot be said that it does not require registration on the ground that it has merged in the decree of the Court'. The learned advocate submitted that the Hon'ble the Apex Court was also pleased to hold that, 'the question of Registration would depend on whether the award created any right, title in the suit property or not'.

The learned advocate for the petitioner reiterated that for enforcement of the award, it was compulsorily registrable and in absence of registration of the award, the same could not have been enforced. He submitted that therefore, the order passed by the learned Judge in Darkhast requires to be quashed and set aside.

The learned advocate appearing for the petitioner could not convince this Court that these decisions hold good even after the enactment of the new Act, namely, Arbitration and Conciliation Act, 1996. In fact the learned advocate could not bring out the full impact of the enactment/ amendment of the law on the subject.

11. Mr.Kavina, the learned advocate appearing with Mr.Dhiraj Patel for respondent no.1 submitted that let he be not misunderstood, he is not addressing the Court on

the scope of jurisdiction of a Court in a revision application, because the respondent has an exceptionally good case on merits. He submitted that he be permitted to address the Court first on merits and then on the point of jurisdiction. He submitted that his addressing on merit first be not treated to have given up the contention of jurisdiction.

The learned advocate Mr.Kavina for the opponent submitted that as it was widely felt that 1940 (Arbitration Act, 1940) which contains general law of arbitration has become outdated, it was felt necessary to amend it, to make it more responsive to the contemporary requirements. The cry of the day was that the law should be amended extensively and therefore, ultimately the law is amended and now the new act of Arbitration and Conciliation Act, 1996 has come in force since 22nd August 1996. He submitted that the new law is enacted so as to cope up with the requirement of domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards.

The learned advocate submitted that in contrast to what was provided in 1948 on the point of enforcement of award, the new Act provides for enforcement in section

36.

For ready perusal, section 36 is reproduced and it reads as under:

“Enforcement - Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.”

The learned advocate submitted that the Legislature with purpose has enacted the aforesaid section in the phrase, set out in bold letters. He submitted that if the Legislature wanted the award to be implemented/ enforced in a manner in which a decree of the Court is enforced, the aforesaid phrase would not have been employed. He submitted that the Legislature in its wisdom intended to put the 'arbitral award' on the same pedestal that of 'a decree of the Court' and therefore, the phrase used is the award shall be enforced as if it were a decree of the Court.

He submitted that once the award is put on the same pedestal the necessary consequences followed and it did not remain compulsorily registrable. The learned advocate appearing for the respondents submitted that the decisions cited by the learned advocate for the petitioner are prior to 1996 and therefore, the law stood before 1996 enactment is considered by the Hon'ble the Apex Court. He submitted that in fact this was the lacuna which was experienced in making the arbitral awards popular in the commercial world and therefore, the law was amended on this line. He submitted that these decisions will not have any application now in view of the changed scenario. So far as old law is concerned, these decisions have binding effect but they have no application to the law as it stands today. The learned advocate submitted that the decisions of the Hon'ble the Apex Court deal with clause (b) of subsection (1) of Section 17 of the Registration Act, 1908. The learned advocate submitted that the said law stands as it is, but then the Legislature has amended/ enacted a new law of Arbitration and while enacting the new law the Legislature has done away with the requirement of registration of an award by putting the same on a high pedestal of a decree of the Court. That being so, the

award does not remain compulsorily registrable. He submitted that in that view of the matter the decisions cited and relied upon by the learned advocate for the petitioner shall not hold back the Court and it should be held that the same has no application to the facts of the present case.

The learned advocate for the respondents submitted that subsection (2) of section 17 of the Registration Act provides that nothing in clauses (b) and (c) of subsection (1) applies to clause (iv) which deals with the decree or order of the Court. He submitted that once an arbitral award is put on a pedestal of a decree of a court, necessary consequence is that it does not remain compulsorily registrable. He submitted that even at the cost of repetition he be allowed to submit that it is with this object in mind, the Legislature employed the phrase in section 36 of the Arbitration and Conciliation Act, 1996 that - **"the award shall be enforced as if it were a decree of the Court."**

12. The learned advocate for the respondents submitted that this being revision application unless the learned advocate for the petitioner is able to convince the Court that the learned Judge has exercised a jurisdiction not

vested in him or has refused to exercise a jurisdiction vested in him no interference at the hands of this Court is called for. He further submitted that the learned Judge has taken pains to see that any injustice is not done to any of the parties, has gone deep into the matter. He has appreciated the reply filed by the present petitioner (respondent no.1 in Darkhast) in para 7. He has then taken into consideration exh.54, further reply of the present petitioner in para 8. He has also taken into consideration the rejoinder affidavit filed by the applicant (of Darkhast)-the respondent herein and then has come to the conclusion that the petitioner is entitled to proceed against the respondent to execute the award in the sum of Rs.50,47,045=00, i.e. 1/3rd of the amount as share of the petitioner.

The learned advocate submitted that the learned Judge was conscious about the rights of the other party and therefore, while dealing with the outstanding liabilities of Income Tax and Sales Tax, the learned Judge provided that,

“.. .. Therefore, as and when such liabilities arise, it goes without saying that respondent no.1 would be legally entitled to recover the same from the petitioner if the same

is unpaid by the petitioner. There is no reference to the liabilities of various trusts, the Sales Tax liabilities paid for earlier years, outstanding liabilities for advocates' fees as mentioned in Schedules VI, VII and VIII in the award."

13. In view of the aforesaid discussion this Court finds that the submissions made by the learned advocate for the petitioner that the award is 'non enforceable' has no substance and the same is rejected. The Court also finds that the learned Judge has not committed any error which warrants interference at the hands of this Court. Hence the Civil Revision Application fails. Rule is discharged with no order as to costs. Interim order stands vacated.

(RAVI R. TRIPATHI, J.)

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